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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1081

In the Matter of:

WALTHAM PRECISION INSTRUMENT COMPANY, INC., a corporation, formerly known as WALTHAM WATCH COMPANY, WALTHAM WATCH COMPANY, a corporation, JOSEPH AXLER and MELVIN AXLER, Individually and as Officers or former Officers of said corporations, *Petitioners*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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v.

FEDERAL TRADE COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Waltham Precision Instrument Company, Inc., a corporation, formerly known as Waltham Watch Company, Waltham Watch Company, a corporation, Joseph Axler and Melvin Axler, individually and as officers or former officers of said corporations, by their attorney, B. Paul Noble, pray that a Writ of Certiorari issue to review the "Final Decree Affirming and Enforcing Order To Cease and Desist"[1] entered

[1] Appendix "A", Case No. 14022.

by the United States Court of Appeals For The Seventh Circuit on the 19th day of February, 1964. That decree and order affirmed an Order of the Federal Trade Commission entered in its docket No. 6914 on October 16, 1962.[2] The Opinion of the Federal Trade Commission upon which that Final Order was based issued July 20th, 1962.[3]

OPINION BELOW

The Opinion of the Court of Appeals was entered January 8, 1964, in Case No. 14022 and is officially reported at 327 F2d 427.[4]

JURISDICTION

The United States Court of Appeals, Seventh Circuit, on January 8, 1964, entered its Opinion on Petition To Review a Cease and Desist Order of the Federal Trade Commission. Thereafter, that Court, on February 19th, 1964, entered its Final Decree Affirming and Enforcing the Commission's Order to Cease and Desist.

This Court, by its Order dated April 7, 1964, extended the time for filing this petition for a writ of certiorari until May 7th, 1964.[5]

The jurisdiction of this Court is invoked pursuant to Section 5 of the Federal Trade Commission Act, 15 U.S.C.A. 45(c); (g) and (h) and pursuant to 28 U.S.C.A. 1254(1) and 2101(c).

[2] Appendix "B".

[3] Appendix "C".

[4] Appendix "D" Waltham Precision Instrument Co. Inc. et al. v. F.T.C. 327 F2d 427.

[5] Appendix "E".

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Federal Trade Commission can ascribe to a trade name a meaning which identifies the products upon which it is used with domestic manufacture, so as to permit it to require affirmative disclosure of the country of origin of each component of such products not entirely manufactured in the United States?

2. Whether an Order, entered against predecessors in interest and management of a company already subjected, in part, to a similar order in another proceedings, is arbitrary and capricious or constitutes a denial of due process of law?

3. Whether the Federal Trade Commission in a Section 5 proceeding can require the user of a patent to cease and desist representing the patented device to be what the patent grant establishes it to be by application of a definition adopted prior to the advance in the prior art represented by the grant of that patent?

4. Whether the Federal Trade Commission can extend its jurisdiction under Section 5 of the Federal Trade Commission Act to the regulation of patents and trademarks, or whether this Court should delineate the extent to which that agency may encroach upon the jurisdiction of other regulatory agencies whose actions have given rights, in commerce, inconsistent and incompatible with Commission policy with respect to advertising?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statutes involved in the determination of the questions presented are:

The Federal Trade Commission Act: Section 5(a),[6] (b);[7] 38 Stat. 719, 15 U.S.C.A. 45(a), (b). (Act of September 26, 1914, as amended).

The Lanham Trademark Act, 60 Stat. 433,[8] 458;[9] 15 U.S.C.A. 1064, 1115. (Act of July 5, 1946, as amended).

Article 1, Section 8 Clause 8, Constitution of The United States.

Patent Act of 1952, July 19, 1952, C.950 ¶ 1, 66 Stat 798 35 U.S.C.A. ¶ 103.

As provided in Rule 23(d) of this Court's Rules, the statutory provisions above noted are printed in the Appendix to this Petition.

CONCISE STATEMENT OF THE CASE

The jurisdiction of the Court below was based upon Section 5(d) of the Federal Trade Commission Act.[10]

These proceedings commenced October 14, 1957, by the issuance of the Complaint which alleged that the petitioners' advertising and representations were false, misleading and deceptive, in violation of Section 5 of the Federal Trade Commission Act.[11] An Answer was filed, setting forth that there had been a material change in corporate structure of the Waltham Watch Company, the Massachusetts corporation named in that orig-

[6] Appendix "F", 5 U.S.C.A. 45(a).

[7] Appendix "G", 5 U.S.C.A. 45(b).

[8] Appendix "H", 15 U.S.C.A. 1064.

[9] Appendix "I", 15 U.S.C.A. 1115.

[10] 15 U.S.C.A. 45(d).

[11] "Appendix to Petitioner's Brief", hereinafter referred to as P.A., filed with the record herein, pp. 1-6.

inal complaint.[12] Consequently, the Commission, on March 26, 1958, issued its amended and supplemental Complaint[13] which added the Waltham Precision Instrument Company, a Massachusetts corporation formerly known as the Waltham Watch Company; and also the Waltham Watch Company, a Delaware corporation as respondents. The same five individual respondents were named in both Complaints.

Hearings were held in Washington, D. C., Chicago and New York at various times between June 27, 1958, and December 2, 1960.[14] An Initial Decision[15] was entered by the agency examiner on November 13, 1961. Upon appeal to the Commission, an Opinion and Proposed Order issued July 21, 1962.[16] Thereafter, on October 16, 1962, the Commission adopted that proposed order as "Final Decree Affirming and Enforcing Order To Cease and Desist".[17] Upon Petition to Review, the Seventh Circuit Court of Appeals entered its Opinion on January 8, 1964,[18] and the "Final Decree Affirming and Enforcing Order To Cease and Desist"[19] to which this application is addressed, was entered on February 19, 1964.

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[12] P.A. pp. 6-9.

[13] P.A. pp. 9-14.

[14] 2 P.A. p. 21.

[15] P.A. pp. 20-38.

[16] Appendix (hereafter used in references to Appendix, this Petition for Writ of Certiorari). Appendix "C".

[17] Appendix "B".

[18] Appendix "D".

[19] Appendix "A".

The Final Decree Affirming and Enforcing adopts the Final Order of the Commission. It requires the petitioners here [20] to cease and desist:

> 1. Representing in any manner, directly or indirectly, including any number in the use of the name or names of their watches, that watches manufactured or sold by them contain a designated number of jewels, unless said watches actually contain a designated number of jewels, each and every one of which serves a purpose of protecting against wear from friction by providing a mechanical contact with a moving part at a point of wear.
>
> 2. Using the name "Waltham" in advertising or in labeling to designate or describe watches manufactured or sold by them without expressly, clearly, conspicuously, and prominantly stating in immediate connection therewith the country of origin of each component of said watches which is not entirely manufactured in the United States.

The Waltham Watch Company *of Massachusetts*, which had imported watches from Switzerland since about 1950, in 1956 granted an exclusive license to Hallmark, Inc. for the use of the tradename and trademark "Waltham" on watches. [21] In 1957, by virtue of a "spin off", the Waltham Watch Company, *a Delaware corporation*, acquired all of the assets and rights of the Massachusetts corporation in the watch and clock industry including the license agreement to Hallmark, Inc. [22] The Massachusetts corporation, at or about the time of the "spin off" to the Delaware corporation, changed its name to the Waltham Precision Instru-

[20] The agency Order dismissed as to all other individual respondents.

[21] P.A. pp. 27, 42, 43.

[22] P.A. pp. 27, 42, 43.

nent Company and has since continued to do business under that name in Waltham, Massachusetts, as a manufacturer of precision instruments other than watches and clocks.[23]

Immediately after the "spin off", the Waltham Watch Company moved its offices and principal place of business to New York City, operating there under the management and control of the Axlers (individual petitioners here) until 1959, when other interests (Aronson) acquired control of the Company, assumed its management, and moved the company to Chicago. This successor management was also the management of Hallmark, the licensee above referred to, and Hallmark and the Waltham Watch Company merged in 1959, consolidating the business vested by the license agreement (watches) with the remainder of the old Massachusetts business divested at the time of the "spin off" (watches and clocks).[24]

The Axlers were officers and directors of the Massachusetts corporation from December, 1956, until July, 1957. They became officers of the "spin off" (Delaware) corporation from its inception on June 30th, 1957, until Aronson (Hallmark) acquisition of control on or about July 1, 1959.[25] The Axlers have had no interest whatsoever in either of the corporate petitioners here since the date that Aronson interests acquired control of the Waltham Watch Company.[26]

The same Waltham Watch Company that is here

[23] P.A. pp. 25, 29, 109, 134, 135.

[24] P.A. pp. 83, 93, 94, 127-129, 137, 143.

[25] P.A. p. 27.

[26] P.A. p. 28.

petitioning this Court is presently subject to a Final Order of the Federal Trade Commission which is similar to the order here under consideration in respect to the prohibitions contained in each of them with reference to the use of the tradename Waltham.[27] A Final Decree Affirming and Enforcing was entered in that case on June 28, 1963.[28] That Final Decree affirms a final Commission Order[29] against the Waltham Watch Company, and its present management (Aronson).

The Final Order of the Commission there adopted an order entered by the hearing examiner in that Commission proceeding.[30]

The Order in that case, insofar as it is here actually material to the questions presented in this case, provides that the Waltham Watch Company (and the Aronsons) cease and desist:

> 1. Using or authorizing any person to use the name "Waltham" in connection with the sale of clocks or any other product unless it supervises said use and insures that the name is so utilized that:
>
> 1. The public is clearly warned by a statement immediately in connection therewith, that the product is not manufactured by the Waltham Watch Company of Waltham, Massachusetts, and

[27] Seventh Circuit Court of Appeals, October Term 1963, Case No. 13,858, *Waltham Watch Co., et al v. F.T.C.*; 318 F2d 28, decided 1963 (Cert. denied).

[28] Appendix "J", this petition.

[29] Appendix "K".

[30] Matter of Waltham Watch Co., et al. F.T.C. docket No. 7997, Appendix "L", this petition.

2. If the product is of foreign origin, the country of origin of the product is clearly and conspicuously disclosed on the product, on the advertising used in offering it for sale, and on any package or container in which the product is enclosed, in such manner that the name of the country of origin will not be hidden, obscured or obliterated.

II. Placing any means or instrumentality in the hands of others whereby they may mislead the public, as to the manufacturer of any product which they sell, the manufacturer's age, experience and reputation or the country of origin of the product.

As above mentioned, the Waltham Watch Company (original Massachusetts corporation) became an importer about ten years before the merger with Hallmark, Inc. of its "spin off" (successor) corporation, and about six years before the Axlers acquired control of the petitioner here now known as the Waltham Precision Instrument Company.[31] Hence, the historic old Waltham Company had become an importer even prior to the grant of license to Hallmark, Inc., which preceded control of the Axlers (petitioners here) that brought about the "spin off" of the watch and clock business to the Delaware corporation, that (after Arcanson control) merged with Hallmark — all of the so-called "domestic competitors" began importing at about the same time as the Massachusetts petitioners corporation.[32]

The present Waltham Watch Company is a manufacturer and an importer. It imports Swiss movements and the country of origin is marked under the numeral

[31] P.A. p. 139.

[32] P.A. pp. 27, 28, 42, 43; 135-145.

"6" on the face or dial of the assembled watches. Thus, as the owner by virtue of "spin off" of the trademarks and tradename "Waltham", it is continuing the same business acquired from the history rich Massachusetts parent corporation (now the Waltham Precision Instrument Company) but the plant has been moved from Waltham, Massachusetts, to Chicago, Illinois.[33]

The Representations

The Axlers had disseminated advertising statements such as:[34]

> "Watches that are worthy successors to the famed, history rich Waltham creations of the past 107 years."
>
> "The 25-jewel Premier by Waltham .... America's First Watch."
>
> "The 25-jewel Premier group has patented oil-reserve jewels, a horological development that adds 8 ruby jewels to the customary 17 friction bearing jewels."

Jewels

The Answer of the Waltham Watch Company admits that it imported 17 jewel watch movements from Switzerland and that, after importation, a patented device known as Resevoil and containing eight additional jewels was attached to the movements which were then represented as containing 25 jewels. It denies the deception alleged in the Complaint.[35]

René Fiechter is the inventor and co-owner with

[33] P.A. pp. 28, 42, 43, 83-94, 127-199, 95-109, 134-145.

[34] P.A. pp. 30, 31, 182-183.

[35] P.A. pp. 7, 8, 15, 16, 18, 29, 32, 33, 36, 43-48.

Allen V. Tornek of the Resevoil patents. The patents were granted by the United States Patent Office for "Lubricating Jeweled Bearings Of Watch Movements And Like Instrument Parts."[36]

As found by the examiner,[37] the second Fiechter patent (2,920,401)[38] is merely an improvement upon his first Resevoil patent (2,478,865).[39]

The two patents and the claims set forth in each of them describe the Resevoil jewels as "jewels" and "lubricating jewels".

Although the eight Resevoil jewels do not touch a moving part at a point of wear, they (when assembled in their plates to the basic 17 jewel movements) form constituent parts of newly constituted jewel bearings. Their addition to the movement improves the mechanism by providing additional oil where it is needed. This results in longer life expectancy of the movement and diminishes the need for cleaning the movements.[40] An expert called by the agency testified that Waltham's 25 jewel (Resevoil) watches were "25 jewel watches."[41]

REASONS RELIED ON FOR GRANTING WRIT

The decision of the Court below is novel. It affirms an agency order restricting or limiting the free use of a legitimate tradename and trademark by its lawful

[36] P.A. pp. 177, 178, 185, 186.

[37] P.A. p. 29, and since not inconsistent with other findings by the Commission adopted P.A. p. 52.

[38] P.A. pp. 185-187.

[39] P.A. pp. 177-181.

[40] P.A. pp. 31-36, 43-48.

[41] P.A. p. 80.

owner. Although the Commission has in the past required qualifications to be used in conjunction with the use of tradenames, it has heretofore confined that extension of its jurisdiction under Section 5 to cases where a mark or name having acquired special meaning or special significance was adopted as a tradename in order to pass off the user's product as having that special quality, whereas in fact it did not. It has not heretofore exercised such jurisdiction to limit or impair the right to use a tradename that has acquired a secondary meaning. The predecessor owner (Waltham Precision Instrument Company) was an importer and had established a ten year history of use of the name "Waltham" on imported watches. The name "Waltham" had lost its primarily geographic meaning as the name of a city in Massachusetts by 1899.[42]

The decision of the Court below is in conflict with the decision of the Supreme Court of the State of Massachusetts in that landmark trademark case.

The decision below is also novel in that it imputes a third meaning—"*Made in U.S.A.*" to a tradename that had acquired a secondary meaning by which its use by the owner on its products identified such products with the owner in derogation of the original geographic meaning. Requiring petitioners to qualify their use of "Waltham" by using a statement in conjunction therewith as to the *country of origin of each component of foreign origin* assumes a novel legal concept without precedent, to wit, Waltham has, since 1899, come to mean "*Made in U.S.A.*" It must be borne in mind that the products are conceded to be marked in con-

[42] *American Waltham Company v. U.S. Watch Co.*, 173 Mass. 85, 53 N.E. 141 (1899).

formity with requirements of the Bureau of Customs with respect to marking the country of origin.

This Court is asked to decide whether the Federal Trade Commission can base a cease and desist order upon a theory that deception arises when the owner of a valid tradename makes the economic determination to use his property in that name on products that contain imported components, where theretofore he has used the tradename only on products domestically manufactured, and where the goods are properly marked as to the country of origin of such components.

The novel Commission theory advanced by its decision here is that deception arises merely from the use of the tradename, not from the failure to reveal country of origin.

It is not claimed and the record did not establish that "Waltham" had a special significance or special meaning denoting quality. The Commission has maintained throughout the course of these proceedings that "Waltham" has come to mean manufactured in the city of Waltham, Massachusetts, of domestic components, hence, that its use without qualification on goods containing imported components is deceptive.

In doing so here [43] the Commission has either acted arbitrarily and capriciously in extending its jurisdiction in a Section 5 proceeding into areas where the Commissioner of Patents and Secretary of the Treasury have heretofore exercised exclusive jurisdiction, or it has, in its quasijudicial administrative exercise of powers granted, established a precedent in the law of

[43] And in the earlier Waltham case in another way, *Waltham Watch Co. v. F.T.C.*, supra.

trademarks and tradenames of vast economic significance to the national economy, since many other historically domestic tradenames are being used by their present owners on goods composed in whole or in part of imported components marked merely in conformity with Treasury Department requirements as to country of origin. This Court should consider and determine whether the Federal Trade Commission has been delegated such power by Congress or whether its assumed novel jurisdiction here is, indeed, arbitrary and capricious.

In addition, the Court is here asked to decide for the first time whether the Commission can enter two orders against the same company, both relating to the same subject matter, and whether an order against a corporation and its present officers is res judicata so as to bar the entry of a similar order against the corporate and managerial predecessors of the company in another case where the predecessors are no longer connected with the business or in any way chargeable with the conduct of its affairs. As a corollary, the Court is asked to determine as a novel question whether two orders of the Commission, both related to the same subject matter, and, in part, to the same parties, will result in such confusion in their enforcement as to constitute a violation of due process of law or a confiscation of property in denial thereof.

Finally, the Court is asked to determine whether the Commission can vitiate the use of products developed under the valid grant of a patent, when it finds that such use is deceptive because it falls outside the scope of an administrative definition established prior to the advance in the prior art represented by the patent. The Court should consider whether the exercise of such

jurisdiction by the Commission is in violation of Article 1, Section 8, Clause 8 of the Constitution of the United States.

ARGUMENT

The Trade Name "Waltham"

Undisputed Facts

It is suggested that the following salient facts are not in dispute:

1. Waltham Watches were being imported by the famous old Waltham Watch Company of Waltham, Massachusetts, long before the license agreement with Hallmark, Inc., and the "spin off" that resulted in the creation of the Waltham Watch Company (of Delaware).

2. The Waltham Precision Instrument Company, formerly known as the Waltham Watch Company, has not been engaged in the business with which the Complaint in the proceedings below is concerned.

3. The individual Petitioners here, Joseph Axler and Melvin Axler, have not been connected with the Waltham Watch Company since 1960.

4. The alleged representations are neither false nor misleading unless the tradename "Waltham" has lost its proprietary (secondary) meaning and acquired a third meaning which identifies it with products solely of American manufacture.[44]

5. The representations alleged were all made by the old Waltham Watch Company (Massachusetts).

[44] The clause commencing with *unless* in this order quoted below involves a question of what Petitioners submit to be novel law.

"The Law of Trademarks is one cornerstone of the law of unfair competition; considerations arising out of the competitive relationship, therefore, should prevail over any claimed public right. Such a right cannot be invoked as a shield for the furtherance of unfair competition." [45]

Petitioners urge that the Commission's Order is arbitrary and capricious in that it would require them to cease and desist:

> Using the name "Waltham" in advertising or in labeling to designate or describe watches manufactured or sold by them without expressly, clearly, conspicuously and prominently stating in immediate connection therewith the country of origin of each component of said watches which is not entirely manufactured in the United States.

It is conceded that the Waltham Watch Company has acquired by succession the rights to the use of the trademark and tradename "Waltham" which had originally vested in a watch enterprise started by Aaron Dennison in 1849 in Waltham, Massachusetts.

There is no evidence in the record to disprove or establish the falsity of any of the representations made by petitioners with respect to their watches, nor have either the Commission nor the Court of Appeals relied upon such evidence to sustain the orders entered.

The Commission's Order and the Court's Decree are both predicated upon the theory that the unqualified use of the tradename "Waltham" and of truthful slogans concerning the product becomes deceptive when

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[45] Callman, Rudolph, "Unfair Competition and Trade Marks" (Callaghan, Chicago, 2nd Ed.) Vol. 3, page 1671.

the product is composed of imported components.[46]

The Commission, in substance, found that watches containing Swiss movements were sold under the tradename "Waltham" and by the use of slogans in advertising both of which deceptively represented them to be entirely manufactured in Waltham, Massachusetts.

It is submitted, that in so finding, the Commission has given to "Waltham" the third meaning that is without precedent. In so doing, it is respectfully submitted, it has blasted away one of the cornerstones of the law of unfair competition by permitting a misconceived sense of public right to prevail over considerations arising out of the competitive relationship. It has invoked this false claim of public right as a shield for the furtherance of unfair competition.[47]

The Commission assumed the gravamen of Petitioner's argument to be true, i.e. Waltham, when used on watches has come to mean watches made by the owner of that tradename, then, argues that it furnishes no defense to a charge of the use of the name "Waltham" to falsely represent that the watches were manufactured in the United States.

It is submitted that this Court may well consider the following expression by the Court in an earlier case involving a similar order against one of the petitioners here.

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[46] For emphasis, it is here repeated that the original company (Massachusetts corporation) became an importer long before the Axlers in the succession of its management, used the slogans complained of below.

[47] *Singer Mfg. Co. v. June Mfg. Co.*, 166 U.S. 169, 41 L. Ed 118; (1896); and see also; *McLean v. Fleming*, 96 U.S. 245; 24 L. Ed. 828 (1878).

The Court of Appeals [6] in the earlier Waltham case stated:

> "Although if we were fashioning the remedy, we might have done so in some respects differently from that of the Commission, yet, as the function is primarily that of the Commission, we will approve the Order as the Commission prepared it."

It must be noted that the Order here is much more broad than it was there. The Commission there required that the public be warned by a statement in conjunction with the use of "Waltham" that the product is not manufactured by the Waltham Watch Company of Waltham, Massachusetts; and that if the product is of foreign origin, the country of origin be clearly disclosed on the product and on the advertising used in offering it for sale.

The Order here being reviewed would go even further and require petitioners to clearly disclose the country of origin *of each component of "Waltham" watches not entirely manufactured in the United States;* and from using terms such as "America's first Watch," and "the first American Watch Company" (even though there is no evidence either that these terms are false or that they are deceptive).

In the case at bar, the Court is considering distinctively different facts, altogether different evidentiary factors and, most significantly, the advertising and marketing policy of the old company involving representations that are true and sans evidence of deception.

It is respectfully submitted that, in addition, the Court there relied upon cases that are not dispositive of the issues raised. Conceding that those cases are

[6] *Waltham Watch Company v. F.T.C.*, 318 F. 2d 28 (at 29)

authority for the proposition that "the owner of a trademark or tradename may not use, nor permit the use of, such trademark or tradename in a manner designed to deceive the public," it is nevertheless respectfully submitted that the lawful owner's decision to use a validity acquired trademark or tradename on imported rather than domestic products is not deception.

In the Singer case[19] where the effect of a generic word was in issue, this Court said it did not follow that the general power, vested in the public, to use the name imports that there is duty imposed on the one using it to adopt such precautions as will protect the property of others and prevent injury to the public interest, where by doing so no substantial restriction is imposed on the right of freedom of use—"This principle is elemental and applies to every form of right and is generally expressed by the aphorism 'sic utere tuo ut alienum non laedas'—".

The Commission must repeatedly fall back upon its contention that the sale of imported watches under the tradename "Waltham" is deceptive because the "name (has) long (been) associated by the public with entirely American made products."

It must do so because there is no evidence of deception and because the alleged false representations are true, unless when used in conjunction with the name Waltham on imported watches they become deceptive or false and misleading because that name has acquired a third meaning which identifies it with products made in the U.S.A.

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[19] *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169, 41 L. Ed. 118 (1896).

We submit that there is no precedent for such a proposition, none has been cited nor can any be inferred from the precedents relied upon.

"Waltham" Does Not Mean "Made in U.S.A."

"Waltham" is a valuable property right now owned by the Waltham Watch Company of Delaware.

After the "spin off" the Massachusetts corporation changed its name to the Waltham Precision Instrument Company, Inc., which has been engaged in the precision instrument business (other than watches) in Waltham, Massachusetts. The Waltham Watch Company has been engaged in the manufacture, importation, distribution and sale of watches since the "spin off," and since the merger with Hallmark, Inc., its plant and principal place of business has been located in Chicago.[50]

The Final Order of the Commission would require all of the Petitioners here to cease and desist from:

> Using the name "Waltham" in advertising or in labeling to designate or describe watches manufactured or sold by them, without expressly, clearly, conspicuously, and prominently stating in immediate connection therewith the country of origin of each component of said watches which is not entirely manufactured in the United States.[51]

The learned Commissioner, delivering the Commission's Opinion, stated:[52]

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[50] P.A. pp. 27, 28, 42, 43, 50, 83-93, 127-129, 94-109, 134-137, 138-143.

[51] Appendix "B" this petition.

[52] Appendix "C" this petition.

> The record shows . . . that the name Waltham has, over a period of 100 years and more, come to be associated by the public with watches manufactured by the famous old American company bearing that name. As the advertisements above quoted show, the Axler management and Hallmark exploited this common understanding of the name Waltham by repeatedly referring to it as "'America's Finest Watch'; made by the "first American watch company", etc., etc. The fact is, however, that the movements of the watches sold by respondents under the name "Waltham" are not made in the United States at all, but are imported from abroad. The sale of such watches under a name long associated by the public with entirely American made products—an association obviously accentuated by respondents' own advertising—is obviously deceptive.

It is upon this fallacious reasoning that the Commission has rested the portion of the Order here under consideration.

The reasoning is fallacious unless a novel, unprecedented concept of trademarks and tradenames will here be judicially sanctioned. The proposition that a tradename can acquire a meaning which identifies the products upon which it is used with American manufacture is absolutely without precedent in the law of trademarks and tradenames.

Secondary Meaning

"Waltham" had acquired a secondary meaning which had been judicially recognized by 1899.[33]

By that time it had acquired common acceptation by

[33] *American Waltham Co. v. U.S. Watch Co.*, 173 Mass. 85; 53 N.E. 141 (1899).

long and continuous use and had lost its primarily geographic significance.

In other words, though it originally had meant "watches made in Waltham, Massachusetts," by 1899 the court had come to recognize the legal fact that it had lost that geographic significance and come to mean watches manufactured by the owner of the tradename. Had it not acquired this secondary meaning, it could not have become a tradename.

Now the Commission, by its Order, and in the proposition of law quoted above as its basis, would restore the geographic significance which Waltham had lost by 1899. In fact, it would not only restore that geographic meaning, but broaden it from mere identification of a town in Massachusetts to mean "made in the United States" when used on watches. There is no precedent to support such a restoration, and the cases relied upon by the Commission and the Court below are not authority for the proposition.[24] The order here is in direct conflict with the opinion of the Massachusett's Supreme Court there.

It is a well known fact that many large American companies have become importers. As above noted, in the Concise Statement of the Case, the record here establishes that Bulova, Elgin and Hamilton, all competitors of Waltham, have become importers and that the Massachusetts corporation now known as Waltham Precision Instrument Company became an importer in 1950, long before the license to Hallmark, Inc. or the "spin off" of the watch business to the Delaware peti-

[24] *Edw. P. Paul & Co., Inc. v. F.T.C.*, 169 F. 2d 294 (C.A.D.C. 1948). See also other cases cited in footnote 6, P.A. p. 50, but compare *F.T.C. v. Walker's New River Mining Co.*, 79 F. 2d 457, 586, (C.C.A. 4, 1935).

tioners.[55] Waltham, like all competitors, marks the country of origin under the numeral "6" on the face or dial of the imported watches in conformity with the requirements of the Tariff Commission.[56]

Obviously, the above quoted portion of the Commission's Order singles out Waltham in a highly competitive industry and would unfairly and inequitably require it to "water down" its tradename, while competitors whose acts and practices are identical, will continue to use their equally well established tradenames without qualification or limitation.

The value of a tradename or trademark is vested in the right to use it for advertising and marketing.

It would appear that the Commission, having a mandate from the Congress to maintain fair competition, is here fostering unfair competition. Quaere; If the Massachusett's Petitioner were to re-acquire the rights to the tradename, could it use it without qualification on imported movements in the same manner it did before licensing that use to Hallmark, Inc.?

The Waltham Case Decided in 1899[57] is Res Judicata On The Issue of Secondary Meaning, and the Decision Below in Conflict With that Decision

That case is a landmark in the law of secondary meaning and discussed by every authority who has written in the field of tradenames and trademarks.

There the respondent had begun the manufacture of watches in Waltham in bona fide. The problem

[55] P.A. p. 139.

[56] P.A. p. 139.

[57] *American Waltham Co. v. U.S. Watch Co.*, supra.

which arose was stated by the late Mr. Justice Holmes, then presiding judge of the Massachusetts Court as follows:

> It is desirable that the Plaintiff should not lose customers by reason of the public mistaking another manufacturer for it. It is desirable that the Defendant be free to manufacture watches at Waltham and to tell the world that it does so. The two desiderata cannot both be had to their full extent and we have to fix the boundaries as best we can (Page 86 of that decision).

Confronted with this problem, the Court there decided that the predecessors of petitioners had made the name Waltham so widely known for watches that the primary trade meaning of the word "Waltham" in fact indicated the Plaintiff's article and not the geographical locality. Consequently, the Court deemed the mark "Waltham" a valid common law trademark and enjoined the Defendant absolutely from using "Waltham" in a trademark sense and in particular from advertising its watches as "Waltham" watches. But the Court went even further, enjoining the Defendant from a nondenominative use of the term by also forbidding the Defendant to state upon the dials of its watches that they were made in Waltham. The Defendant was not even allowed to use the name Waltham, Massachusetts, on the inner plates of its watches without an accompanying statement clearly distinguishing its watches from those of the Plaintiff.[5]

Geographical names having attained a controlling secondary meaning have been held valid regardless of the domicile of the producer. It is common knowl

[5] Derenberg, Walter, "Trade Mark Protection and Unfair Trading," Matthew Bender, Albany, N.Y., 1936, page 341.

edge, for instance, that a consumer buying "Paris" garters,[59] "Philadelphia Cheese",[60] etc., does not believe or understand that the products he is buying emanate from the geographical place captured in the tradename.

In the "Phillies" cigar case,[61] the right to use the word "Phillies" in the tradename was upheld even though the evidence established that as far back as 1932 many of the company's cigars were manufactured in New Jersey.[62]

It is also well settled that the right to protection of a geographical name that has acquired secondary meaning, "is not lost because the one using it moves his plant to a place which does not bear the name which has thus been used as a tradename . . ."[63]

The Effect of Waltham's Move to Chicago from Massachusetts

Since it should be conceded that Petitioners could have escaped the bondage of the negative limitation or positive disclaimer required by this Order had they remained in Massachusetts after acquiring control of the company, the Court must acquire into the significance of the move to Chicago.

[59] *A. Stein & Co. v. Liberta Garter Co.*, 198 F. 959 (D.C.S.D.N.Y. 1912).

[60] *Intl. Cheese Co. v. Phoenix Cheese Co.*, 103 N.Y.S. 362 (1907).

[61] *Bayuk Cigars v. Schwartz*, 1 F. Supp. 286 (D.C.N.J. 1932).

[62] See also: *Anheuser-Busch v. Budweiser Malt Products Co.*, 295 F. 306 (C.C.A. 2, 1923); *Hyde Park Clothes, Inc. v. Hyde Park Fashions, Inc.*, 204 F. 2d 223 (C.C.A. 2, 1953).

[63] Nims, Harry D., "Unfair Competition and Trade Marks," Baker, Voorhis & Co., Inc., N.Y., 4th Ed. 1947, Vol. 1, page 315.

The Commission has never challenged the validity of the present ("spin off") company's title to the tradename and trademarks "Waltham". However, by virtue of its order, it does challenge the right to use those properties in Chicago in the same manner they could have been used had economic or other considerations advised management to remain in Waltham and import as the Massachusetts corporation had prior to the Hallmark license.

Petitioners respectfully submit that the Commission in so doing completely ignores the wealth of law controlling this issue.

The prominent trademark authority, Harry D. Nims, has treated this subject at some length:

> The right to protection of a geographical name used to indicate source, is not lost because the one using it moves his plant to a place which does not bear the name which has thus been used as a tradename. This is not a reason why he may not continue to claim protection in the use of the name of the place where formerly he was located, if prior to the time of his removal he has acquired a secondary meaning as used by him. (Badlin v. Cusenier, 221 U.S. 580, 31 Supreme Court 669 (1910).)

In Siegert v. Gandolfi,[31] it is stated that:

> If the geographical name has become a secondary designation indicative of the product of the particular manufacturer, it is as much entitled to protection as any arbitrary or fancy name which he might have selected; and the circumstances that the manufacturer might have removed his place of business and is making his product in some other place is of no more consequence that it would be if he had adopted the fancy name.

[31] *Siegert v. Gandolfi*, 149 F. 109 (C.C.A. 2, 1906).

There, complainants were the successors of the original manufacturer of "Siegert's Angostura Bitters" with which the name "Angostura" had long been identified. This was the name of a city in Venezuela where the bitters were first made, though the factory had long since been transferred to Trinidad. Defendants made bitters of a similar kind at Baltimore, and sold them as "Angostura" Bitters imitating at the same time complainant's bottles and labels, but correctly stating in the labels and circulars their own name and the place of manufacture. However, the word "Angostura" had acquired a secondary meaning and was not open to the use of Defendants and these rights were not lost by the removal.

It is interesting to note in connection with the petitioner's argument that the deception found is novel and predicated upon the use of the tradename "Waltham" on watches with imported movements, the following statement of the hearing examiner in his initial decision:

> This is not a case where an importer brings foreign made goods into the country and fails to reveal their foreign origin to the public. In this case the old and famous American name "Waltham" is used repeatedly in various ways to mislead the public into believing that the old Waltham firm is still manufacturing all parts of its watches in the United States.[65]

As was earlier noted, the Commission in its Opinion reiterated this fallacious theory that deception can arise out of the mere use of a valid tradename by its American owner on goods that are imported in whole or in part.[66]

[65] P.A. p. 37.

[66] P.A. pp. 49-51.

But, as was above pointed out, the right to use a valid geographic tradename which has acquired secondary meaning is vested in the owner of that tradename.

If the Ford Motor Company wishes to sell Fords imported from Afghanistan, it has a right to do so. In other words, the owner of a valid tradename can "water down" its property but the Federal Trade Commission cannot order it to do so. By the same token, Ford, which now imports many components into the manufacture of a once wholly domestic product, cannot be required to label each component as to its foreign origin merely because the product sold is a Ford.

The proposition underlying the Order here would require all name brand manufacturers to either discontinue the importation of foreign components and products (contrary to economic public policy) or to label the ultimate product like a bill-board, disclosing the foreign origin of each imported component. There is no basis in law to support that proposition.

A tradename once acquired cannot, as the Commission contends, pass into the public domain. The property right vests, rather, in the owner of the tradename. It identifies the product with the owner and becomes a property which is subject to the owner's control. The public has no vested interest in the exercise of control over private property of this nature any more than it does over general rights in and to personal property.

"Waltham" having acquired a secondary meaning by 1899 has come to mean watches made by the owners of that tradename. It is conceded that Petitioner, Waltham Watch Company, has by succession acquired such right and owns the name.

Hence, Waltham does not mean made in Waltham, Massachusetts, it had lost that meaning by 1899—nor does it mean made in U.S.A.—as the Commission contends. It means that the watches upon which it is used as a tradename are the products of the owners of the tradename, i.e., the Waltham Watch Company, successor in a line of direct descent from "America's First Watch."[67]

Since there is no deception alleged other than that involving the use of "Waltham" on imported watches superior in quality[68] to those formerly made by prior owners of the tradename in Massachusetts, this Court may well consider granting this petition and determine the limits of the Commission's jurisdiction to interfere with historically valid use of domestic tradenames on imported goods.

Improper Parties

The Waltham Precision Instrument Company has had nothing to do with the watch business since the "spin off" of that business to the Waltham Watch Company in 1957.[69]

The Axlers have had nothing to do with the Waltham Watch Company since acquisition by Aronson interests of control in 1959.

The Commission has entered a Final Order which

[67] *Gebbie v. Stitt*, 82 Huh. (N.Y.) 93; 31 N.Y. Supp. 102. Compare *El Moro Cigar Co. v. F.T.C.*, 107 F. 2d 429 (C.C.A. 4, 1939). See also: *ex parte Fils de R. Picard et Cie*, 9 U.S.P.Q. 208 (Comm. of Patents, 1931) and *Hazel Bishop, Inc. v. Perfemme, Inc.*, 137 U.S.P.Q. 4 at page 5; (C.C.A. 2, 1960).

[68] P.A. p. 135.

[69] P.A. p. 42.

has been affirmed by the Court in case No. 13,858 (F.T.C. Docket No. 7997 supra) against one of the petitioners.

The Order there requires that the Waltham Watch Company (and its officers) use and supervise the use of "Waltham" in connection with the sale of clocks or any other product to insure:

"1. The public is clearly warned by a statement immediately in connection therewith, that the product is not manufactured by the Waltham Watch Company of Waltham, Massachusetts, and

2. If the product is of foreign origin, the country of origin of the product is clearly and conspicuously disclosed on the product, on the advertising used in offering it for sale, and on any package or container in which the product is enclosed, in such manner that the name of the country of origin will not be hidden, obscured or obliterated."

Paragraph 2 of the Order in this case provides:

"(That Petitioners cease and desist) 2. Using the name "Waltham" in advertising or in labeling to designate or describe watches manufactured or sold by them, without expressly, clearly, conspicuously and prominently stating in immediate connection therewith the country of origin of each component of said watches which is not entirely manufactured in the United States."

Petitioners submit that the Order (in the portions here discussed) are redundant, confusing, and that the entry of a second order against the Waltham Watch Company constitutes administrative harassment in the

circumstances and is a violation of due process of law.[70]

Petitioners further submit that the order against Waltham Precision Instrument Company, out of the business with which the Commission is here concerned since 1957, constitutes an abuse of administrative power and a denial of due process of law.

In addition, the Order against the Axlers who have been out of the business at hand since 1959 will likewise constitute an abuse of delegated powers and is arbitrary and capricious.

Jewels

It should be pointed out that the representations set forth in paragraph four of the complaint form the gravamen of the issue as to representation of jewel content.

The representations complained of—all relating to the Waltham Premier line—are similar to the following, quoted from paragraph four:[71]

"The 25 jewel premier group has patented oil-reserve jewels, a horological development that adds 8 extra ruby-jewels to the customary friction bearing jewels."

It should here be noted that the Commission, in reversing the Initial Decision in the Matter of Allen V. Tornek,[72] did not reverse, qualify, modify or other-

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[70] *Carter Products, Inc. v. F.T.C.*, 196 F. 2d 821 (C.C.A. 7, 1951). See also *Jacob Siegel Co. v. F.T.C.*, 327 U.S. 608, 612; 66 S. Ct. 758, 760, and *D.D.D. Corp v. F.T.C.*, 125 F. 2d 679.

[71] P.A. p. 11.

[72] Matter of *Allen V. Tornek*, F.T.C. Docket no. 6344, 276 F. 2d 513.

wise alter its findings that Resevoil, when attached to a watch movement, "significantly increased the amount of oil to vital parts and assures longer life expectance thereof."[73]

We submit that the Waltham representations here at issue truthfully and accurately qualify the use of the word "jewel" in the company's advertising of 25 jewel (Resevoil) Waltham watches.

Waltham has merely restated the Commission's holding with reference to Resevoil in representing that the 25 jewel watches have "*patented oil reserve jewels, a horological development that adds 8 extra ruby jewels to the 17 customary friction bearing jewels.*"

It is submitted that Waltham's representations of its use of Resevoil, are in accord with the ruling of the Commission in Tornek and not false, misleading or deceptive.

What is a Frictional Bearing?

Insofar as the jewel issue is concerned, the essence of the Order is that a watch jewel to be represented as such, must serve a mechanical purpose as a frictional bearing, that is; each jewel must provide a mechanical contact at a point of wear—that Resevoil jewels do not meet this test.

In fact, the definition is pleaded as part of the allegation in Paragraph Five of the Complaint.[74] The Complaint assumes that this definition is the one known

[73] Commission Conclusion 5, "Findings as to the Facts, Conclusions and Order", Matter of Allen V. Tornek, F.T.C. Docket No. 6344, issued May 13, 1959, page 10.

[74] P.A. p. 11.

to the public and adopted by the industry. But the record here refutes that assumption.[75]

It is submitted that the determination of the definition of a watch jewel is a question of fact and not a legal conclusion.

Apart from the pleading of the definition there is absolutely no testimony or other evidence in this record that a jewel must serve a "mechanical purpose as a frictional bearing; that is, provide a means of contact with a moving part at a point of wear", nor that this definition is known to the trade much less the public.

Since pleading is not proof, a minute review of the record may be in order.

Counsel supporting the complaint offered no evidence whatsoever tending to prove or substantiate the alleged definition, which the answer of Waltham definitely put in issue.

The weight of the evidence, adduced from many well qualified experts called by petitioners is that there is no such thing in physics or mechanical engineering terminology as a "frictional bearing." These same experts, on the other hand, establish, that a watch jewel to be represented as such and as understood technically and among watch makers or in the trade, *must be functional in a watch and usually performs a lubricating function* as a part of a jewel bearing or jewel bearing assembly.[76]

Since the Tornek case, which established the functional utility of 21 jewel Resevoil based upon the earlier

[75] P.A. pp. 146-170.

[76] P.A. pp. 146-176.

Fichter patent (August 9, 1949, #2,478,865), the Court should, and the Commission did not, review and consider this record in light of the later patent (January 12, 1960, #2,920,441).[77]

Two of the three government experts were not familiar with Resevoil at all.[78] Schwartz alone, and he was a Bulova employee, contravened the presumption raised by the grant of the U.S. Patent and his testimony by sheer force of numbers is outweighed by the testimony of the many other disinterested experts who were called to testify.[79]

The Court is asked to take official notice of the acts of Congress relating to the grant of patents insofar as they prescribe that the grant of a patent is prima facie evidence of the utility and novelty of the thing patented.

Since the presumption is not rebutted in this record, the Fichter patents must protect the Fichter invention of a functional device known as Resevoil, which the patents themselves establish as an advance in the prior art of jewel bearings.

But if evidence to support the prima facie presumption of the statute is needed, it is here present. The record establishes that 8 jewel Resevoil is superior and mechanically distinct from 4 jewel Resevoil; that both improve the jewel bearings of which, upon assembly, they become a functional part by adding lubrication to the bearing thus providing for longer and more efficient life of the bearing. In turn both the 4 and the 8

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[77] Both patents are in evidence, P.A. pp. 177-181; 185-187.

[78] P.A. pp. 63-67; 68-82.

[79] P.A. pp. 110-125.

jewel Resevoil type bearing are improvements in the prior jewel bearing art and superior to the simple hole jewel bearing and the standard cap jewel bearing assemblies of the prior art.[80]

By force of the patent, the findings of the Commission in the Tornek case above referred to and on the weight of testimony in this record, the 8 jewels used by Waltham in 25 jewel Resevoil type watches are functional as parts of watch bearings and as such fall within the definition established by the evidence in this record of a jewel; they are accordingly properly represented as jewels by the Waltham Watch Company.

Did the Court of Appeals' Definition of a Jewel Differ From the Commission's in Tornek?

In its per curiam opinion in Tornek referred to above and by the Commission in its Opinion here, the Court said:[81]

"Examination of the testimony before the Federal Trade Commission shows clearly that in the 21 jewel watches commonly sold by others in the trade, there are no jewels that do not serve *either a function of bearing or a function of prevention against wear from friction.*"

Appellants here argue that the above is a judicial determination of the definition of a watch jewel which differs from that pleaded here,[82] and since the evidence above referred to establishes that the 8 jeweled Resevoil device, by adding lubricant at vital parts of the

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[80] P.A. pp. 145-179.

[81] *Allen V. Tornek v. F.T.C.*, 276 F. 2d 513.

[82] P.A. p. 2.

movement, serves the function of "prevention against wear from friction" as was the expert opinion of every witness asked the specific question, the Commission's findings on the Resevoil issue are, it is submitted, arbitrary and capricious.

That the examiner had difficulty in reconciling the pleaded (Commission) definition of a jewel with the portion of the opinion in the Tornek case above quoted is quite apparent.

In his initial decision,[53] the examiner disposes of this argument by saying—"this is clearly not what the Court intended by its language since it affirmed the Commission's order . . .", and "that it is undoubtedly what the Court of Appeals meant to express by its alternative reference."

But the language is precise and clear and no rationalization of what the Court "meant" or "intended" is necessary.

Had the Court, on review of the Tornek record, meant merely to adopt the Commission definition that a jewel must serve a mechanical purpose as a frictional bearing, it could have done so by simply restating the Commission definition. But, by the use of other language providing alternative definitions for watch jewels, the Court reflected its review of the record and expressly provided its own definition, one which had never before been used by the Commission.

Petitioners argue that the Court of Appeals was stating, as a fact, the definition in the trade or watch industry, in its opinion, and that its statement is inconsistent with the findings and conclusions of the exam-

[53] P.A. p. 35

ner here (based upon the pleaded definition) and inconsistent with the evidence in this record.

Throughout this case, the Petitioners have argued and their evidence established that the 8 patented oil reserve jewels in Resevoil used by Waltham increase the efficiency and extend the longevity of the moving parts of the watch by adding lubrication to the bearings. In so doing those jewels must, a fortiorari, "prevent against wear from friction" since that is the gist of the lubricating function of all jewels in all bearings.

This Court has held that language of a Court of Appeals must be consistent with the facts and construed to mean exactly what is said where precisely and clearly stated.[84]

While the cases cited involved interpretation of the Internal Revenue Code, the principal is the same as in the case at bar. The two distinct definitions cannot stand antipodal without the creation of industrial confusion.

It is most respectfully here submitted that the controlling definition since Tornek has been that above quoted from the Court of Appeals decision and not that of the Commission in Tornek which was pleaded in the Complaint here.

How Can This Patented Device Be Represented?

The Court must give some consideration to the patent aspects of this case. As was pointed out above, Fichter the inventor of Resevoil, acquired two U.S.

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[84] *C.I.R. v. Church's Estate*, 335 U.S. 632; *Helvering v. Hallock*, 308 U.S. 106; *Helvering v. St. Louis Transit Co.*, 296 U.S. 38.

patents. The plates referred to in the record as Resevoil plates are based upon those patents and are supplied to Waltham, among other customers, by Fichter's successor in interests to the patents, Resevoil International, Inc.

The patents never were acquired by Waltham or any of the respondents contrary to the Commission's findings.[25]

It must be conceded that the Commission cannot, in Section 5 proceedings, nullify a patent or extinguish its use by a patentee or his successors in interest.

In other words, no order of the Commission has, nor can one ever require the holders of Resevoil patents to cease and desist from producing Resevoil plates. Nor can the Commission order any of Resevoil's customers to cease and desist from using those plates.

The Commission, and properly so, has only been concerned with the representations as to the jewels in those plates used by various Resevoil customers.

And, specifically, the Commission has here deliberated the representations of Waltham with respect to patented Resevoil jewels.

The attention of the Court is invited to 35 U.S.C.A. 103, which states: "a patent may not be obtained though the invention is not identically disclosed or described as set forth in Section 102 of this Title, *if the difference between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which such subject matter pertains.*"

[25] P.A. p. 29

"Patentability shall not be negated by the manner in which the invention was made." (*Emphasis supplied*)

In essence, this section of the patent act, commonly known as the Patenf Act of 1952, provides that a subsequent patent will not issue unless the subject matter thereof was not obvious in the prior art.

It is a familiar maxim of patent law that the claim defines the invention.[56]

Petitioners maintain that in the present commercial development (8 jewel Resevoil) the Court has confronted for the first time the mounting of the covered jewel in a recess separated from the recessed filler plate whereby a cavity is formed between the chambers containing the "floating" or "idler" jewels and the space within the bearing, thus constituted, to be lubricated.[57]

The addition of a separate filler plate was acutely important in the commercial assembly, and added the 8 patented lubricating jewels to four simple hole jewel bearings thereby constituting (forming) a new and improved Resevoil jewel bearing assembly.

It is further maintained that the patent claims, which are both novel and unusual and an advance in the prior art citing the earlier Fichter patent, stand in an even more favorable patent position because the history of the prosecution of patent #2,920,441 was not only considered by the examining division of the

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[56] *Bishop and Babcock Mfg. Co. v. Fedders-Quigan Corp.*, 6 A.2d 122 U.S.P.Q. 542; *Intl. Latex Corp. v. Warner Bros. Co.*, (D.C. Comm.) 120 U.S.P.Q. 149; *Geo. D. Converse and Co., Inc. v. Standard Packaging Corp.*, (D.C.N.J.) 122 U.S.P.Q. 230.

[57] See patent claims in #2,920,441; also testimony of Fordon, P.A. pp. 146-170, 186-187.

United States Patent Office, but the question of claim allowance was also considered by that agency's administrative tribunal.[88]

Finally, it is urged that it would be unfair and inequitable to require any user of the product of the patent to denote the patented lubricating jewels by any term other than jewel, especially since they are conceded to be made from the same material as other watch jewels and because the record establishes that they are so made for the same reasons other watch jewels are made from the same synthetic substance.[89]

Throughout the patent (#2,920,441) the stones involved in the patent claims are referred to and characterized as "jewels".[90]

The patent granted speaks for itself even though a patentee is his own lexicographer.[91]

It appears to be arbitrary and capricious for one government agency to issue a patent monopoly with its associated rights and privileges, which patent has been carefully scrutinized in an examining procedure involving not only the customary examination but also a "sieving" through the administrative tribunal (P.O. Board of Appeals), and for another agency of the government to destroy or remove the effectiveness of the monopoly by requiring the patent users to define his

[88] Patent Office Board of Appeals.

[89] See testimony Tordion, P.A. pp. 146-150.

[90] P.A. pp. 186-187.

[91] *Marion v. Ford*, (D.C. So. Cal.) 117 U.S.P.Q. 378; *Turchan v. Bailey Meter Co.*, (D.C. Del.) 119 U.S.P.Q. 165; *In re Hall & Stokes*, (C.C.P.A.) 117 U.S.P.Q. 403.

invention in strange and unusual terms inconsistent or outside the scope of the monopoly granted.

The examiner in his Initial Decision here referred to a multitude of consent orders and stipulations within the Commission which he relied upon in finding that 33 years of acquiescence in an obsolete or even nonexistent definition, justified adoption of the definition in the instant *litigated* case wherein the evidence convincingly establishes the error inherent in the adoption of that definition.

Granting that the Commission has jurisdiction to stand in the way of fraud and deception, can it exercise that jurisdiction so as to impede inventive progress, constitutionally encouraged and Congressionally guaranteed?

This would not, we submit, be the first time that a definition had to bow in acquiescence to the advancement of knowledge. Did not Newton's theory and Einstein's Relativity, as outrageous examples, result in the discard of mathematical and metaphysical maxims generally accepted before the advances were suggested? Columbus did not prove *the world* round, he disproved accepted definition.

CONCLUSION

Wherefore, for the Reasons stated, the petitioners pray that this Petition For A Writ of Certiorari addressed to the United States Court of Appeals for the Seventh Circuit To Review the Final Decree Affirming and Enforcing the Final Order of the Federal Trade Commission in its Docket No. 6914 be granted.

Respectfully submitted,

B. Paul Noble

Attorney for Petitioners

CERTIFICATE OF SERVICE

I certify that a true carbon copy of the foregoing Petition For A Writ of Certiorari was mailed, first class, postage prepaid, to the Honorable Archibald Cox, Solicitor General of the United States, Department of Justice, Washington, D.C., and another such copy in like manner to J. B. Truly, Esq., Assistant General Counsel, Federal Trade Commission, Washington, D.C., all on this 12th day of May, 1964.

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